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Case No. _____

IN THE
Supreme Court of the United States

October Term, 1984

MILLER BREWING COMPANY,
Petitioner,

v.

BREWERY WORKERS LOCAL UNION NO. 9, DIRECTLY AFFILIATED LOCAL UNION, AFL-CIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Does the Seventh Circuit's decision refusing to find a violation of Section 8(b)(2) of the National Labor Relations Act conflict with well established federal labor policy and decisions of this Court, by permitting discrimination against individuals where such discrimination is the product of alleged good faith?

II. Does the Seventh Circuit's decision refusing to find a violation of Section 8(b)(2) of the National Labor Relations Act conflict with well established federal labor policy and decisions of this Court, by creating an exception to the prohibition against discrimination where there is no evidence that any individual has actually been discriminated against?

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REFERENCE TO OPINION BELOW

The decision of the United States Court of Appeals for the Seventh Circuit dated June 25, 1984, is a published opinion which is reproduced as Appendix A and which appears in the West Federal Reporter System at 739 F.2d 1159. That decision substantially affirmed a decision of the Federal District Court for the Eastern District of Wisconsin which is a published opinion reproduced as Appendix C and which appears in the West Federal Reporter System at 562 F. Supp. 1368.

JURISDICTION

The decision of the Court of Appeals for the Seventh Circuit was entered on June 25, 1984. A petition for rehearing and suggestion for rehearing en banc was

denied by that court on August 23, 1984. An order extending time to file a petition for writ of certiorari was issued by this Court on September 14, 1984. This Court has jurisdiction pursuant to 28 U.S.C. §1254.

STATUTES INVOLVED

This case involves Sections 7, 8(a)(3) and 8(b)(2) of the National Labor Relations Act, 29 U.S.C. §§157, 158(a)(3) and 158(b)(2), which provide in relevant part:

> §157. Right of employees as to organization, collective bargaining, etc.
>
> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the

right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

§158. Unfair Labor Practices

(a) Unfair Labor Practices by Employer.

It shall be an unfair labor practice for an employer--

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:

* * *

(b) Unfair Labor Practices by Labor Organization.

It shall be an unfair labor practice for a labor organization or its agents--

* * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this Section...

RULE 28.1 LISTING

Pursuant to Supreme Court Rule 28.1, petitioner submits the following list of all parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates of petitioner. In accordance with the instructions of the Clerk, only publicly traded corporations are listed:

Philip Morris Incorporated

STATEMENT OF THE CASE

This matter arose as a result of Petitioner Miller Brewing Company's action against Brewery Workers Local Union No. 9, pursuant to 29 U.S.C. §185, to vacate an arbitration award issued pursuant to a collective bargaining agreement between the Company and the Union. The arbitration award which Miller Brewing Company sought to vacate held that Miller had breached its 1981-83 Collective Bargaining Agreement with the Union by not affording certain employees of a former brewer in the Milwaukee area (the Jos. Schlitz Brewing Company) a "hiring preference" over Miller Brewing Company's own temporary employees. Prior to 1981, Miller, Schlitz, and the Pabst Brewing Company all comprised a multi-employer bargaining unit known as the

Brewery Proprietors of Milwaukee, Wisconsin, and negotiated one contract with Local Union No. 9. In early 1981, Schlitz withdrew from that group effective at the expiration of the 1979-81 collective bargaining agreement, and bargained on its own with the Union. Therefore, as of the end of the 1979-81 agreement, Schiltz employees were no longer members of the same multi-employer bargaining unit as Miller and Pabst employees, and Schlitz began negotiating a separate agreement with the Union.

The contract clauses which formed the basis for the "hiring preference" in the 1981-83 Collective Bargaining Agreement provide:

> 3. The Employer may hire employees from any source; laid off regular employees of those Employers signatory to the

1979-81 Agreement shall receive preference over all applicants for employment after which men with experience in the brewing industry shall receive consideration over other applicants for employment when they are available and competent to fill vacancies. The Employer shall notify the Union prior to hiring new employees.

* * *

5. "[R]egular employees laid off from other signatory Employers or those Employers signatory to the 1979-81 Agreement shall have preference in hiring before any such temporary employee is recalled. (emphasis added)

The reference to "Employers signatory to the 1979-81 Agreement" was the method by which the Union included Schlitz employees in this hiring preference scheme. A Union security clause in the 1981-83 Agreement and in predecessor agreements provides that, as a condition of employ-

ment, all employees shall, after the thirtieth day following hiring, become and remain members of the Union in good standing. Thus, all of the "regular" employees who receive preference in hiring under the hiring preference clauses are, by definition, members of the Union.

Before the court below, Miller argued that the hiring preference clauses upon which the arbitration award was based, when combined with the union security clause also contained in the 1981-83 agreement and previous collective bargaining agreements, created an unlawful contractual scheme which discriminated in favor of Union membership in violation of Section 8(b)(2) of the National Labor Relations Act. That Section provides that it is an unfair labor practice for a

labor organization "to cause or attempt to cause an employer to discriminate against an employee" in order to encourage or discourage membership in any labor organization. Since the preference was to be afforded to Schlitz employees who, as of 1981, were no longer part of the multi-employer bargaining unit comprised of Miller and Pabst, the sole factor affording them such preference was membership in Local No. 9. By definition, all such former regular employees of Schlitz were members of the Union under the union security clause of the contract. The combination of these clauses, therefore, resulted in discrimination in favor of Union members in violation of §8(b)(2) of the Act. The Court of Appeals described this as an "ingenious and technically

adequate argument," (App. A, p. 10), but rejected it nonetheless on essentially two grounds. Both grounds are erroneous, would have serious negative effects on well established federal labor policy, and conflict with prior decisions of this Court. Therefore, the writ of certiorari should be granted.

REASONS FOR GRANTING THE WRIT

I. IF ALLOWED TO STAND UNCORRECTED, THE SEVENTH CIRCUIT'S DECISION, CREATING AN EXCEPTION TO THE PROSCRIPTION AGAINST LABOR ORGANIZATION DISCRIMINATION FOR ACTS TAKEN IN ALLEGED GOOD FAITH, WOULD UNDERCUT FEDERAL LABOR POLICY AS RECOGNIZED BY THIS COURT.

At page 12 of the Opinion, the Seventh Circuit noted that it was impressed by the fact that when the Union negotiated the hiring preference clause at issue in 1981, it did so based on its

reasonable, though erroneous, belief that Schlitz would agree to a reciprocal clause granting Miller and Pabst regular employees preference in hiring at Schlitz. The court noted that the intent was therefore to continue the arrangement under which the Milwaukee area brewers had operated for many years; i.e., as one large multi-employer bargaining unit.

Yet the panel's reliance on the Union's alleged good faith is patently misplaced. As this Court recognized long ago, it is not necessary to establish a specific unlawful intent in order to find a violation of §8(b)(2); both a Union and an employer are held responsible for the foreseeable consequences of their actions. Radio Officers' Union of the Commercial Telegraphers Union, AFL v. NLRB, 347 U.S.

17, 45 (1954). This Court's reasoning was based on an elementary principle: That "the desire of employees to unionize is directly proportional to the advantages thought to be obtained from such action." Id. at 46. This Court recognized that the entire policy behind §§8(b)(2) and 8(a)(3) was to insulate employees' jobs from their organizational rights, and to permit employees to "abstain from joining any union without impairing their livelihood." Id. at 40.

The decision of the Seventh Circuit, if allowed to stand, will completely undercut the above stated important federal labor policy. The encouragement of union membership was plainly a foreseeable consequence of the Union's negotiation of the hiring preference clauses

with Miller and Pabst. Under the arrangement, Miller and Pabst were required to notify the Union if they intended to hire new applicants and, by virtue of the hiring preference clauses, they were required to give first preference in hiring to union members; i.e., regular employees laid off from prior signatory employers, specifically Schlitz. Outside applicants for employment with greater experience in the brewing industry who applied at either Miller or Pabst would be discriminated against solely because they did not receive brewing industry experience at Miller, Pabst, or Schlitz and, therefore, by definition, were not represented by this Union. Clearly, the arrangement was specifically intended by the Union to operate as a job security

benefit in favor of only Local No. 9 members. Therefore, the issue was not the Union's good faith as between Miller, Pabst, and Schlitz. The issue was whether the Union's intentional actions had a foreseeably discriminatory effect on outsiders to that arrangement, namely employees not currently employed by any of the three employers at issue. By virtue of this clause, those employees stood below Schlitz employees (who were now strangers to the Pabst-Miller bargaining unit), while they should have stood as equals. The discrimination was deliberate, and it was fundamental. It deprived all outside job applicants of a potential livelihood based solely on the Union membership status of a group of applicants who had no legitimate claim to that advantage.

Although numerous decisions of the National Labor Relations Board have carried this Court's rationale in Radio Officers' Union into practice, the Seventh Circuit curiously disregarded that clear expression of federal labor policy. For example, in Construction, Building Materials and Miscellaneous Drivers, Local No. 83, 243 NLRB 328, 333-34 (1979), in the context of a hiring hall system under which experience was counted only if it was with an employer signatory to that union's contract, the Board held:

> Here ... seniority is based on service with employers signatory to agreements with respondents ...
>
> * * *
>
> [T]he contract provisions, on their face, indicate that seniority is based upon Union considerations. Under these provisions, an employee with

> greater experience in the industry may lose an opportunity for referral to a lesser experienced employee solely because the lesser experienced employee worked for a signatory employer while the more experienced employee did not. The provisions, therefore, give rise to the inference that employees are discouraged from exercising their Section 7 right to work with a non-union employer and are instead encouraged to work with employers signatory to agreements with respondent unions (emphasis added).

See also Local Union No. 77 of the International Brotherhood of Painters and Allied Trades, AFL-CIO (Colorite, Inc.), 222 NLRB 607 (1976) (unlawful discrimination found in referral program since only experience with signatory employers was counted); International Photographers of the Motion Picture Industries, 197 NLRB 1187 (1972), enforced without opinion, sub nom. International Photographers

of Motion Picture Industry v. NLRB, 477 F.2d 450 (D.C. Cir. 1973), cert. denied, 414 U.S. 1157 (1974) ("Industry Experience Roster" found unlawful since it was based solely on service with employers signatory to collective bargaining agreements with the union); Directors Guild of America, Inc., 198 NLRB 707 (1972), enforced, 494 F.2d 692 (9th Cir. 1974) (same).

In none of the Board cases cited above was there a showing of a specific intent by the union to discriminate in order to encourage union membership. The inference that such discrimination was intended was based upon the foreseeable consequence of the hiring hall or the hiring preference scheme at issue. Therefore, the Seventh Circuit's reliance here upon the alleged good faith of the

Union was patently erroneous. Its holding would seriously undermine longstanding federal labor policy and Section 7 of the National Labor Relations Act, guaranteeing to employees the right to refrain from union activities, since it would open the door to discriminatory acts which directly encourage union membership but which are allegedly taken for other, more legitimate purposes. Here, the ostensibly legitimate purpose, stabilizing employment in the Milwaukee area brewing industry, was erroneously found to outweigh the clearly unlawful discrimination against those individuals who happened not to be members of this Union. Therefore, the Seventh Circuit's holding that these clauses did not violate §8(b)(2) of the Act is in

error, and the writ of certiorari should be granted.

II. IF ALLOWED TO STAND UNCORRECTED, THE SEVENTH CIRCUIT'S CREATION OF AN EXCEPTION TO ILLEGAL LABOR ORGANIZATION DISCRIMINATION FOR ACTS WHICH DO NOT HAVE ANY VERIFIABLE DISCRIMINATORY IMPACT WOULD UNDERCUT FEDERAL LABOR POLICY AND RESULT IN ABUSES.

As further support for its conclusion that these hiring preference clauses did not violate the National Labor Relations Act, the Seventh Circuit noted that there had been "no showing of discrimination against nonunion workers in the actual operation of the hiring-preference clause" (App. A, p. 12). The court's reliance on this factor was erroneous. In Radio Officers' Union, supra, this Court specifically held that there was no need to present actual evidence of encouragement

of union membership in a case such as this, and that a court could legitimately draw an inference of encouragement which was sufficient to establish a violation of the Act. 347 U.S. at 48-51. Similarly, the National Labor Relations Board has held that no showing of actual discrimination is required for a finding of a violation of the Act. As the Board noted in Seafarers' International Union, Atlantic, Gulf, Lakes and Inland Waters District, AFL-CIO (American Barge Lines), 244 NLRB 641, 642 (1979):

> We do not agree with the Administrative Law Judge that specific examples of discrimination are required for the finding of a violation herein.

The Board went on to find that:

> [M]ere maintenance of an agreement, like the one herein, which grants referral preferences based upon prior employ-

> ment for signatory employers constitutes a violation of the Act. Local Union No. 77 of International Brotherhood of Painters and Allied Trades, AFL-CIO (Colorite, Inc.), 222 NLRB 607 (1976).

244 NLRB at 642 n. 6. The Ninth Circuit has similarly recognized and applied this principle. See Robertson v. NLRB, 597 F.2d 1331, 1336 (1979).

Thus, the Seventh Circuit's holding that there was no violation here because there was no showing of actual discrimination and no showing of actual benefit to Union members was in error. Those facts are irrelevant to the issue of whether the hiring preference clauses constituted a violation of the Act. The court's holding would countenance such discriminatory acts which operate in more subtle and less visible ways. In such

cases, it might be difficult, or even impossible, to show actual discrimination against specific non-union individuals, but the coercive effects of the discriminatory acts might nonetheless create a chilling effect on those employees' Section 7 statutory rights. Since, under this Court's decision in Radio Officers' Union, a showing of actual discrimination or actual encouragement of union membership is not necessary in order to find a violation, the Seventh Circuit's decision is in direct conflict and the writ of certiorari should be granted.

CONCLUSION

For the reasons stated above, Petitioner Miller Brewing Company respectfully

requests that the Petition for Writ of Certiorari be granted.

Respectfully submitted this 16th day of November, 1984.

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APPENDIX A

EDITOR'S NOTE

PAGES 1 thru 16 WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

In the

United States Court of Appeals

For the Seventh Circuit

No. 83-2048

MILLER BREWING COMPANY,

Plaintiff-Appellant,

v.

BREWERY WORKERS LOCAL UNION NO. 9, AFL-CIO,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 82 C 925—John W. Reynolds, *Judge*.

ARGUED APRIL 11, 1984—DECIDED JUNE 25, 1984

Before POSNER and FLAUM, *Circuit Judges*, and NICHOLS, *Senior Circuit Judge*.*

POSNER, *Circuit Judge*. Miller Brewing Company sued Local 9 of the Brewery Workers Union under section 301 of the Taft-Hartley Act, 29 U.S.C. § 185, to set aside an arbitrator's award to the union. The award was based on the union's complaint that Miller had violated a collective bargaining agreement with it. The union filed a counterclaim to Miller's suit. The counterclaim, which was based both on section 301 and on section 9 of the United States

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* Hon. Philip Nichols, Jr., of the Federal Circuit, sitting by designation.

Arbitration Act of 1925, 9 U.S.C. § 9, sought enforcement of the arbitration award. On the union's motion for summary judgment, the district court entered an order enforcing the award. It also ordered Miller to pay the union a reasonable attorney's fee, on the ground that Miller's challenge to the arbitration award had been frivolous. Miller appeals both orders.

For many years all the brewers in Milwaukee had bargained with Local 9 in a multi-employer bargaining unit, but by 1979 the unit had only three members—Miller, Schlitz, and Pabst. The successive collective bargaining agreements between the union and the brewers' association contained a union-shop clause requiring every new employee to join the union within 30 days after beginning work and a hiring-preference clause entitling regular employees laid off by any of the brewers to "preference" (not defined) in hiring by any other brewery in the unit. The preference was both over new applicants for employment with the brewery and over any of the brewery's laid-off temporary employees who might be seeking to be recalled or rehired.

Early in 1981 Schlitz announced that it was withdrawing from the multi-employer unit and would negotiate separately with Local 9. The union's president told the two remaining members of the unit, Miller and Pabst, that Schlitz had agreed to include in the separate collective bargaining agreement that it was negotiating with the union the same hiring-preference clause that the multi-employer agreement contained, and Miller and Pabst agreed to a modification of that agreement that would preserve to Schlitz's employees the rights they had had when Schlitz had been a party to it. But matters did not develop as anticipated. The bargaining between the union and Schlitz broke down. The union called a strike, Schlitz closed its Milwaukee brewery permanently, and Schlitz and the union then entered into a shutdown agreement that provided for the "permanent layoff and termination of seniority and employment relationship from the Company of all employees" in the Milwaukee brewery. About 200 workers were affected.

Several months later Miller recalled 39 temporary employees who had been laid off. This recall precipitated the filing of a grievance against Miller by one of the terminated Schlitz workers, Gene Pearson, who claimed that Miller was required by the hiring-preference clause in the multi-employer collective bargaining agreement to give him preference over Miller's own temporary workers. As required by the agreement, the grievance was referred to an arbitrator after it could not be settled informally. He interpreted the reference in the clause to "regular employees laid off from . . . those Employers signatory to the 1979-81 agreement" to include those employees of Schlitz who had been "permanently laid off" as a result of the shutdown agreement with the union. He therefore concluded that Miller had violated the collective bargaining agreement in failing to give Pearson preference. He ordered Miller "to hire Gene Pearson . . . and any other employees similarly situated who had applications on file at the Company and who were not given hiring preference over temporary Miller employees . . . ."

The union sought enforcement of the arbitrator's award under both the Arbitration Act, which has its own standards for the validity of arbitration awards, see 9 U.S.C. § 11, and section 301 of the Taft-Hartley Act, which is the source of federal common law principles governing the validity of labor arbitration awards. But the parties quite properly make no separate point about the Arbitration Act's standards. We may assume that a multi-employer collective bargaining agreement with Milwaukee brewery workers sufficiently involves interstate commerce to come within the reach of 9 U.S.C. § 2, which we construed broadly just the other day in *Snyder v. Smith*, No. 83-2151, slip op. at 11-13 (7th Cir. June 7, 1984). And the Act's exclusion of "contracts of employment of . . . workers engaged in foreign or interstate commerce," 9 U.S.C. § 1, is inapplicable; it has been held to be limited to workers employed in the transportation industries. See *Petro Scalzitti Co. v. International Union of Operating Engineers*, 351 F.2d 576, 579-80 (7th Cir. 1965); *Signal-*

Stat Corp. v. Local 475, United Electrical, Radio & Machine Workers of America, 235 F.2d 298, 301-03 (2d Cir. 1956); *Tenney Engineering, Inc. v. United Electrical Radio & Machine Workers of America, (U.E.) Local 437*, 207 F.2d 450 (3d Cir. 1953) (en banc). But section 301 was enacted long after the Arbitration Act and deals specifically, as the Arbitration Act does not, with labor contracts; it therefore supersedes, within its domain, the standards of the earlier act. *Shearson Hayden Stone, Inc. v. Liang*, 653 F.2d 310, 312 n. 3 (7th Cir. 1981).

Miller's first ground for attacking the arbitrator's award is that it does not "draw its essence" from the collective bargaining agreement. This somewhat curious, but canonical, see, e.g., *W.R. Grace & Co. v. Local Union 759, Int'l Union of Rubber Workers*, 103 S. Ct. 2177, 2183 (1983), wording derives from the statement in *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960), that an arbitrator's award under a collective bargaining agreement "is legitimate only so long as it draws its essence from the collective bargaining agreement." The surrounding language makes clear that what is meant is that the award is valid provided it is an attempt to interpret the collective bargaining agreement rather than to apply the arbitrator's own ideas of right and wrong: "an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." (For a recent application of this standard by this court see *Young Radiator Co. v. U.A.W. Local Union No. 97*, Nos. 82-2215, 82-2249 (7th Cir. May 15, 1984).) The liability as distinct from remedial aspect of the award in this case—that is, the finding that Miller improperly failed to give preferential consideration to the former employees of Schlitz's Milwaukee brewery—passes

this not very demanding test. The arbitrator purported to be interpreting the language of the collective bargaining agreement in finding that the clause had been violated. His interpretation may very well have been incorrect, but that is none of our business. Our function is complete when we are satisfied that the arbitrator was not dispensing qadi justice but was construing the collective bargaining agreement. He was doing that when he held that the Schlitz employees had been "laid off" within the meaning of the collective bargaining agreement, if not within the usual meaning of the term which connotes a temporary rather than permanent cessation of employment.

But we do not think that the remedy he meted out for the violation was based on an interpretation of the collective bargaining agreement, as distinct from the arbitrator's private notions of equity. The agreement provides that laid-off employees of signatory employers are entitled to "preference" over recalled temporaries. The term is not defined in the collective bargaining agreement but Miller's counsel told us at argument (without demur from the union's counsel) that it meant that if a preferred employee and a temporary employee were competing for a job opening the preferred employee would get the job if—but only if—he had a satisfactory work record. Nevertheless the arbitrator did not merely order Miller to give preferential consideration to the laid-off Schlitz employees, or (what would have been the same thing) to hire 39 of those employees if their work records were satisfactory; he ordered Miller to hire Pearson and 38 other former Schlitz employees who had applied for the jobs, period. We might have assumed that it was implicit in this order that the former Schlitz employees have satisfactory work records and thus be entitled to a hiring preference under the agreement, were it not for the fact that the arbitrator ordered Pearson hired unconditionally even though there was no evidence that his work record was satisfactory. We can find nothing in the collective bargaining agreement that gives a hiring preference to a worker who has an unsatisfactory work record; nor can the union; most important, nor could the arbitrator.

Therefore, this part of the award cannot have been based on the hiring-preference clause itself. If it has any basis in the collective bargaining agreement it must be in the agreement's implicit or explicit authorization to the arbitrator to devise remedies for violations of the agreement. Collective bargaining agreements often say little or nothing about the arbitrator's remedial powers; yet it cannot be that he has none; and since he derives all his powers from the agreement, the agreement must implicitly grant him remedial powers when there is no explicit grant. See Hill & Sinicropi, Remedies in Arbitration 20-26 (1981); Feller, *The Remedy Power in Grievance Arbitration*, 5 Indus. Rel. L.J. 128 (1982). This clearly is the Supreme Court's view. The passage we quoted earlier from the *Enterprise Wheel* opinion about the arbitrator's being confined to interpreting the agreement is immediately preceded by the observation that "The draftsmen [of the collective bargaining agreement] may never have thought of what specific remedy should be awarded to meet a particular contingency," 363 U.S. at 597; and the Court went on to uphold the arbitrator's remedy—an award of back pay after the expiration of the collective bargaining agreement—even though the remedy had not been mentioned in the agreement. There are many similar court of appeals decisions; in this circuit alone see, e.g., *International Union of Operating Engineers, Local No. 139 v. Carl A. Morse, Inc.*, 529 F.2d 574, 580 (7th Cir. 1976); *United Electrical Radio & Machine Workers of America v. Honeywell Inc.*, 522 F.2d 1221, 1226-27 (7th Cir. 1975); *Mogge v. District 8, Int'l Ass'n of Machinists*, 454 F.2d 510, 514-15 (7th Cir. 1971).

Here all the collective bargaining agreement said about the arbitrator's remedial powers was that, "Should the arbitration award order reinstatement, the employee shall receive pay in accordance with the findings of the impartial arbitrator." This makes it clear that the arbitrator has the power to order reinstatement of an improperly laid off or fired employee, and seems to make an award of back pay in the amount calculated by the arbitrator

automatic in such a case. But the arbitrator did not order reinstatement. Pearson and the others had never been employed by Miller and therefore could not be "reinstated" by it. The arbitrator ordered Miller to hire former employees of other brewers. Any authority to do this was implicit rather than explicit.

Although there is unavoidable tension between saying on the one hand that the arbitrator may not go outside the agreement and on the other hand that he may exercise remedial powers not expressly granted in the agreement, it is not always hard to tell whether an arbitrator when he formulates a particular remedy is interpreting his implied remedial authority or implementing some personal notion of justice. In this case, for example, the hiring-preference clause implies that the arbitrator can order the company to give preference to one worker over another if the clause requires such preference, even though the remedies section in the collective bargaining agreement speaks only of reinstatement. We can go further and say with some confidence that the agreement implicitly authorizes the arbitrator to order Miller to hire a worker who by virtue of a hiring preference is entitled to be hired to fill a vacancy. But we have no textual guide to the question whether in ordering the hiring of the 39 laid-off Schlitz workers without ascertaining whether they were qualified and therefore entitled to be hired, the arbitrator was exercising remedial powers implicitly conferred on him by the agreement or simply devising what he thought, without reference to the agreement or anything fairly implied in it, would be an equitable remedy.

In these circumstances we must consider whether it is at all plausible to suppose that the remedy he devised was within the contemplation of the parties and hence implicitly authorized by the agreement. Only if we think it clearly was not may we reverse. *Bacardi Corp. v. Congreso de Uniones Industriales*, 692 F.2d 210, 214 (1st Cir. 1982). But that is what we think. It is almost unimaginable that if the question had come up in the collective bargaining negotiations Miller and Pabst would have

agreed that the arbitrator could force Miller or Pabst, as a remedy for breach of the preference clause (the breach here consisting of failing to consider whether the former Schlitz employees had satisfactory work records and should therefore have been offered jobs ahead of the Miller temporaries), to hire workers who might be unqualified because they had unsatisfactory work records. This would go beyond making the victims of the breach of the preference clause whole, and would give unqualified workers windfall gains; and by reducing the efficiency of Miller's operations it might impose greater costs on Miller than the benefits it conferred on those victims. It would be a punitive sanction. Now arbitrators are rarely thought authorized to award punitive damages. It is not the kind of remedy that the parties probably would have agreed to authorize if they had thought about the matter, because of the great power it would give the arbitrator (subject to virtually no judicial review), and the bitter note a claim for punitive damages could inject into the parties' relationship, which is a continuing one. See Hill & Sinicropi, *supra*, at 184-85; cf. *Bittner v. Sadoff & Rudoy Industries*, 728 F.2d 820, 825 (7th Cir. 1984). But in effect this arbitrator imposed a punitive sanction.

We need not decide whether we agree with everything in the Eighth Circuit's recent (and sharply divided) en banc decision in *United Electrical, Radio & Machine Workers of America v. Litton Microwave Cooking Products*, 728 F.2d 970, 972 (8th Cir. 1984). The company in that case forced workers to take paid vacations at inconvenient times, and the arbitrator held that in doing so the company had violated the collective bargaining agreement, and he ordered the company to give the workers an additional paid vacation in the summer. The Eighth Circuit upheld the award on the ground that the arbitrator had not "clearly exceeded" his implied remedial authority under the collective bargaining agreement. Although this is a deferential standard of judicial review, it appears to be somewhat less deferential than when the issue is the

interpretation of an explicit contractual provision. The difference is consistent with our approach in the present case. As for the specific result in *Litton*: Since the agreement was violated and the workers suffered losses as a result, the arbitrator was authorized to devise a remedy that would make them whole. The parties could not have intended otherwise when they agreed that violations of the collective bargaining agreement could be taken to arbitration. Now the particular remedy made the workers more than whole, by giving them a second vacation on top of a first vacation that, while not ideal for them, could not have been completely worthless either. But it would have been difficult to devise a remedy that neither undercompensated nor overcompensated them. Here the injured workers—that is, the former Schlitz employees entitled to preferential consideration by Miller over the Miller temporaries who were recalled—could be made whole very simply (more simply than in *Litton*): they just had to be given the preferential consideration that the arbitrator found had been wrongly denied them, with back pay for those whom the preference entitled actually to be hired. No reason was given or appears for going further; and in going further the arbitrator went beyond the scope of the agreement. The district court's order must therefore be modified to make clear that the company's obligation is to hire 39 *qualified* former Schlitz employees, or such lesser number as are qualified if there are not 39 qualified ones. The arbitrator's award did not say what was to happen to the temporary employees whom Miller had recalled, and we express no view on that question.

Besides arguing that the award went beyond the collective bargaining agreement, Miller argues that the preference clause violates the National Labor Relations Act, in which event it cannot be enforced even in the modified form in which we have upheld the award against a challenge that it was not authorized by the agreement. See *General Warehousemen & Helpers Local 767 v. Standard Brands, Inc.*, 579 F.2d 1282, 1292-93 (5th Cir. 1978) (en banc), cert. dismissed, 441 U.S. 957, 443 U.S.

913 (1979). First, Miller contends that as applied to a non-signatory of the multi-employer collective bargaining agreement the clause discriminates in favor of union members by virtue of the union-shop clause in the agreement, and therefore violates section 8(b)(2) of the Act, 29 U.S.C. § 158(b)(2). Since union-shop clauses are lawful, since an employer is free to and usually does give preference to his own employees over other employees in any collective bargaining agreement he signs, and since all of the employees in a multi-employer bargaining unit are treated as if they were the employees of a single employer, the hiring-preference clause could not have violated section 8(b)(2) when Schlitz was still a member of the unit, even though the clause favored union members (because the union-shop clause assured that the only employees given preference would be union members). Cf. *International Photographers of the Motion Picture Industries*, 197 N.L.R.B. 1187, 1189 (1972), enforced without opinion *sub nom. International Photographers of Motion Picture Industry v. NLRB*, 477 F.2d 450 (D.C. Cir. 1973). But Miller argues, once Schlitz left the unit yet the hiring-preference clause remained applicable to its employees, it is as if Local 9, in negotiating the new collective bargaining agreement with the remaining members of the multi-employer unit, Miller and Pabst, had insisted on a clause requiring that any new employees they hired must be members of Local 9 (at least until all the former employees of Schlitz who wanted to work in the brewery trade in Milwaukee, and had satisfactory work records, had been hired). Such a clause would violate section 8(b)(2).

This is an ingenious and technically adequate argument, and derives support from cases such as *Construction, Building Materials & Miscellaneous Drivers, Local No. 83*, 243 N.L.R.B. 328, 333 (1979), where a violation was found because seniority with the employer was based on service only with companies that had collective bargaining agreements with the respondent union. See also *International Photographers of the Motion Pic-*

ture Industries, supra; Directors Guild of America, Inc., 198 N.L.R.B. 707, 709 (1972). Nevertheless, as we shall explain, the argument does not persuade us. But we reject the union's counterargument that the Labor Board approved the arbitrator's application of the hiring-preference clause to Miller's dispute with the union and that its approval should either be given collateral estoppel effect in this case (because Miller was a complaining party in a proceeding before the Board to challenge the union's invocation of the hiring-preference clause) or be treated as an issue that is within the Board's primary jurisdiction, has been resolved by the Board, and should not be reexamined by us. All that happened is that the General Counsel of the Board decided not to bring an unfair labor practice proceeding against the union. This was not an adjudication by the Board; indeed, it was nothing more than an exercise by the General Counsel of his prosecutorial discretion, and as such is entitled neither to be given collateral estoppel effect nor to be treated as an exercise of the Board's primary jurisdiction. See *Edna H. Pagel, Inc. v. Teamsters Local Union 595*, 667 F.2d 1275, 1279-80 (9th Cir. 1982); *Courier-Citizen Co. v. Boston Electrotypers Union No. 11*, 702 F.2d 272, 276-77 n. 6 (1st Cir. 1983). The union concedes as it must that if the Board has refused to decide the issue we have the power to decide it ourselves, see *Kaiser Steel Co. v. Mullins*, 455 U.S. 72, 83-84 (1982), and this, we think, is the situation.

We also are not impressed by the union's argument that since many workers default on their union dues during a layoff and as a result can be kicked out of the union, it is uncertain how many of the preferred Schlitz workers are still union members. We doubt that the union would be quick to expel members who were laid off as a result of a strike that the union had called but who still wanted to work in the brewing industry. And we are not convinced that section 8(b)(2) can never be violated unless it is a certainty that all the beneficiaries of preferential treatment are union members, though most surely are.

We are impressed, however, by the fact that when the union negotiated the modification of the multi-employer collective bargaining agreement to keep Schlitz workers under the hiring-preference clause, it did so in the reasonable though as it turned out erroneous belief that Schlitz would agree to a reciprocal clause. The intent was thus to continue the arrangement that the Milwaukee brewers had had with the union for many years. Although technically the arrangement would no longer have been part of a multi-employer collective bargaining agreement, we do not think that this difference would be enough by itself to condemn it under section 8(b)(2), added by the Taft-Hartley Act to outlaw the closed shop. See H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 41 (1947). The clause had provided a lawful form of job insurance for brewery workers in all the years that Schlitz had been a member of the multi-employer bargaining unit; and it was natural for all concerned to want to continue this insurance after Schlitz left the unit. True, the continuation of the arrangement did, at least in principle, benefit union members over nonunion members by giving Schlitz employees, who were members of the union, preference over other job applicants who might not be. But the benefit was incidental and maybe nonexistent: the temporary employees whom Miller rehired in lieu of hiring former Schlitz workers were also members of Local 9. There has been no showing of discrimination against nonunion workers in the actual operation of the hiring-preference clause.

Miller argues that the award is also illegal because the union breached its duty to represent in good faith all members of the bargaining units it represents; concretely, that it breached its duty to Miller's temporary employees by putting ahead of them the interests of the laid-off Schlitz employees—employees who presumably are no longer members of a collective bargaining unit that the union represents, the Schlitz brewery where they worked having been closed down, but to whom the union still owes (we may assume) a duty of enforcing the rights that it negotiated with Miller and Pabst on their behalf. Although the National Labor Relations Act does implicitly impose

on the union a duty to represent all members of the bargaining unit in good faith, *Vaca v. Sipes*, 386 U.S. 171, 177 (1967), including in this case the Miller temporaries, the duty is not for the benefit of the company. The proper parties to assert it would be the temporary employees, who are the intended beneficiaries. They did seek to intervene in the district court proceeding, but were turned down; they could have tried to appeal (see 7A Wright & Miller, Federal Practice and Procedure § 1923, at pp. 627-30 (1972)), but did not.

We can understand, though, the concern that has led the company to try to assert their rights. Miller is afraid that if it complies with the arbitrator's order by laying off some of its temporaries in order to make room for the former Schlitz employees who have rights under the hiring-preference clause, the temporaries will sue it for breach of the collective bargaining contract and it will not be able to defend on the ground that the union is the exclusive representative of the workers, because if the union breached its duty of fair representation the workers complaining of the breach can sue the company. *Vaca v. Sipes*, *supra*, 386 U.S. at 186. The arbitrator's finding that the contract requires the company to give former Schlitz employees priority over its own temporaries could not foreclose the temporaries' claim by the principles of collateral estoppel; the temporaries were not parties to the arbitration proceeding, though they tried to become parties.

But if the company really felt itself caught between the conflicting claims of the Schlitz employees and its own temporary employees, it should have tried to join the latter as additional parties to the arbitration proceeding, or at least should have joined them (as it readily could) as additional parties to the district court proceeding. Having made no attempt to do either of these things the company will not be allowed to assert the temporaries' rights in their absence.

This completes our discussion of the substantive issues, but we must also consider whether the district court was

right to award the union its attorney's fees. Normally when no statute authorizes the award of attorney's fees in a particular class of cases—and none does with respect to suits under either section 301 of the Taft-Hartley Act or section 9 of the Arbitration Act—the prevailing party is entitled to attorney's fees only if his opponent's suit or defense was frivolous, which our cases define to mean brought in bad faith—brought to harass rather than to win. See, e.g., *McCandless v. Great Atlantic & Pac. Tea Co.*, 697 F.2d 198, 200 (7th Cir. 1983). If only because we have reversed the district court in part, so that the company has gotten at least some relief from the arbitration award, we cannot agree that the company's suit was frivolous. In addition, though we have rejected the company's argument that the award is invalid under section 8(b)(2) of the National Labor Relations Act, that argument is not frivolous either.

The company's resistance to the arbitrator's finding that it violated the preference clause may have been frivolous; but we doubt whether it would be worthwhile, at least as a general rule, to divide a suitor's claims (or defenses) into frivolous and nonfrivolous, and award attorney's fees in respect to the frivolous claims but not the others. The added burden to the court of making this determination would often outweigh the benefit to the party of obtaining a partial award of attorney's fees. Although it is costly to defend against a frivolous suit, the marginal costs of knocking out the frivolous claims in a suit that has a meritorious core usually are not great. True, there are cases where sanctions are awarded for frivolous activity (abusive discovery, for example) in an otherwise meritorious cause, and these could provide a precedent for a partial award of attorney's fees in a case with a mixture of frivolous and nonfrivolous claims, though the discovery sanctions, for example, are specifically authorized by the federal rules. See, e.g., Fed. R. Civ. P. 11, 16(f), 37(a)(4). At any rate here the union in asking for attorney's fees chose to characterize the entire case as frivolous, and we think it should be held to that characterization and not be given a partial award of attorney's fees that it did not seek.

We share with the union and the district court concern lest companies defeat the objectives of labor arbitration clauses that they have voluntarily negotiated by routinely refusing to honor arbitration awards without any valid grounds for doing so, in order to put the union to the expense of getting the award enforced in court. Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRB*, 96 Harv. L. Rev. 1769, 1787-89, 1797 (1983), presents evidence that some companies have decided to thumb their noses at the remedies that labor law provides for unions, in an effort to convince workers that unions are paper tigers. Maybe this is why some courts have applied what appears to be a less demanding standard to fee requests in labor arbitration cases than in other cases, by giving the party successfully defending the award his attorney's fees if the opposition was "without justification." See, e.g., *Amalgamated Meat Cutters Local Union 540 v. Great Western Food Co.*, 712 F.2d 122, 125 (5th Cir. 1983); *International Union of Petroleum & Industrial Workers v. Western Industrial Maintenance, Inc.*, 707 F.2d 425 (9th Cir. 1983); *Courier-Citizen Co. v. Boston Electrotypers Union No. 11*, *supra*, 702 F.2d at 282; *International Ass'n of Machinists v. Texas Steel Co.*, 639 F.2d 279, 283-84 (5th Cir. 1981); but cf. *Lackawanna Leather Co. v. United Food & Commercial Workers Int'l Union*, 706 F.2d 228, 232 (8th Cir. 1983). Other reasons for the seemingly more liberal standard are the federal policy in favor of arbitration in general and labor arbitration in particular and the fact that, because there are so few grounds for attacking arbitration awards, it is easy to pronounce most such attacks utterly groundless. But we need not decide in this case whether to tilt the standard rule, which in the absence of statute allows an award of attorney's fees only if the suit or defense was frivolous, toward the more liberal rule suggested in the decisions we have just cited. The company's attack on the award was not without foundation. We therefore cannot say that this is a case where the company sought merely to put the union's feet to the fire.

The judgment is reversed in part, and remanded for the limited purpose of enabling the district court to strike the award of attorney's fees and to revise the arbitrator's remedy in accordance with this opinion. But in all other respects the judgment is affirmed. No costs in this court.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

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APPENDIX B

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

August 23, 1984

Before

Hon. RICHARD A. POSNER, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. PHILIP NICHOLS, JR., Senior Circuit Judge*

MILLER BREWING COMPANY,
Plaintiff-Appellant,

No. 83-2048

vs.

BREWERY WORKERS LOCAL UNION NO. 9, AFL-CIO,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 82 C 925

John W. Reynolds, Judge.

ORDER

On August 3, 1984, plaintiff-appellant Miller Brewing Company filed a petition for rehearing with suggestion for rehearing en banc. All of the Judges on the original panel have voted to deny the petition, and none of the active members of the court has requested a vote on the suggestion for rehearing en banc. The petition is therefore DENIED.

*Hon. Philip Nichols, Jr., of the Federal Circuit, sitting by designation.

APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

MILLER BREWING COMPANY,

Plaintiff, DECISION AND ORDER

v.

C.A. No. 82-C-925

BREWERY WORKERS LOCAL UNION NO. 9, DIRECTLY AFFILIATED LOCAL UNION, AFL-CIO,

Defendant.

This is an action to vacate an arbitration award dated July 26, 1982, finding that the plaintiff Miller Brewing Co. had violated its collective bargaining agreement with the defendant Brewery Workers Local No. 9, Directly Affiliated Local Union, AFL-CIO, by recalling its temporary employees rather than preferentially hiring union members who lost their jobs at the Joseph Schlitz Brewing Co. when Schlitz closed its

Milwaukee brewery. The arbitration award also required Miller to hire the former Schlitz employees who had applied for positions with Miller. The Union has filed a counterclaim seeking to confirm the arbitrator's decision.

Presently before the Court are the motion of Gary Lee Blawat, one of the temporary Miller employees who was recalled, to intervene as a third-party plaintiff, the motion of Blawat for class certification, and the motion of the defendant Union for summary judgment. The motion to intervene is opposed by the defendant Union and supported by the plaintiff Miller.

FACTS

The defendant Union was the certified representative for production employees of the Miller Brewing Co., Pabst Brewing Co., and Joseph Schlitz Brewing Co. These

three companies constituted the Brewery Proprietors of Milwaukee, Wisconsin. The collective bargaining agreement entered into between the Union and the Brewery Proprietors effective from June 1, 1979 to June 1, 1981, in article I, set forth a recall procedure in which "regular employees laid off from other signatory Employers shall have preference in hiring before any such temporary employee is recalled."

Prior to the termination of the 1979-1981 collective bargaining agreement, the Joseph Schlitz Brewing Co. withdrew from the Brewery Proprietors to bargain separately with the Union over a contract covering June 1, 1981-June 1, 1983. Miller and Pabst, however, collectively bargained with the Union and on May 23, 1981 concluded a collective bargaining agreement effective from June 1, 1981 to June 1, 1983. The

seniority provision of this new collective bargaining agreement provided in article I, section 5, that "regular employees laid off from other signatory employers or those employers signatory to the 1979-81 agreement shall have preference in hiring before any such temporary employee is recalled."

On June 1, 1981, the Union and Schlitz were without a contract and as a result, the Union went on strike against Schlitz. On July 31, 1981, Schlitz announced the permanent closing of its Milwaukee brewery effective September 30, 1981. Schlitz Brewing Co. sent its employees a Notice of Termination effective September 30, 1981. Subsequently, Schlitz and the Union entered into a shutdown agreement dated December 6, 1981.

On January 4, 1982 Miller Brewing Co. recalled 39 Miller "temporary" employees.

Gene Pearson, a former Schlitz employee, filed a grievance alleging Miller Brewing Co. violated article I, section 5 of the labor agreement when Miller re-employed its temporary employees rather than hiring former Schlitz regular employees who lost their jobs when Schlitz closed its Milwaukee brewery. This grievance was processed through the grievance procedure set forth in the collective bargaining agreement without resolution.

The Union then demanded arbitration of the grievance and on May 14, 1982 a hearing was held before Arbitrator Edward B. Krinsky. On July 26, 1982, Arbitrator Edward B. Krinsky issued and delivered his award concluding that the regular employees of the Joseph Schlitz Brewing Co. were "laid off" within the meaning of the current labor agreement. The arbitrator determined that

Miller had violated the agreement by recalling its temporary employees rather than granting preference to the permanently laid off Schlitz employees as required by article I of the collective bargaining agreement. Under article XXIV, section 3(a) of the collective bargaining agreement, the decision of the arbitrator is final and binding.

MOTION TO INTERVENE

Gary Lee Blawat seeks to intervene as a third-party plaintiff against the Union. The remedy he seeks is the same as that sought by Miller--vacation of the arbitrator's award. Blawat's standing to intervene to challenge the arbitration award is affected not only by the requirements of Fed. R. Civ. P. 24, but also by substantive principles of federal labor law. F. W. Woolworth Co. v. Miscellaneous Warehousemen's Union, Local No. 781, 629 F.2d 1204,

1208 (7th Cir. 1980) cert. denied, 451 U.S. 937 (1981). In this case, substantive rules of federal labor law preclude intervention.

The general rule that has developed is that an employee may not attempt to vacate an arbitration award unless the union has breached its duty of fair representation. In Acuff v. United Papermakers and Paperworkers, AFL-CIO, 404 F.2d 169 (5th Cir. 1968), cert. denied 394 U.S. 987 (1969), the grievance of 63 discharged employees was submitted to arbitration after the Union brought an action to compel arbitration in the district court. The arbitrator denied the grievance of 16 employees and ordered that the discharge of the remaining employees be reduced to a disciplinary layoff. The sixteen employees whose grievances were denied and some of the other employees whose grievances were denied in part sought

to intervene in the district court, which had retained jurisdiction, and to vacate the award.

The Fifth Circuit held that the employees could not intervene. The Court noted that the right to organize entails certain burdens. "One of these is that to some extent the interests of particular individuals are subordinated to the interests of the group both at the contract negotiation stage and thereafter. ... As a result, a union may properly determine not to pursue a member's grievance to the arbitration stage at all." 404 F.2d at 171. The court qualified its holding, however, by stating that relief might be forthcoming if the union had breached its duty of fair representation.

The Ninth Circuit has also held that a fairly represented employee may not seek to vacate an arbitration award. Andrus v.

Convoy Co., 480 F.2d 604 (9th Cir.), cert. denied 414 U.S. 989 (1973).

The Seventh Circuit has allowed union members to intervene where they seek to uphold the arbitration award. In F. W. Woolworth Co. v. Miscellaneous Warehousemen's Union, Local No. 781, 629 F.2d 1204 (7th Cir. 1980), cert. denied, 451 U.S. 937 (1981), the arbitration award was in favor of the discharged employees. The employer successfully prosecuted an action against the union to vacate the award. The union decided not to appeal the district court's ruling. Thereafter, the discharged employees sought to intervene and filed a notice of appeal. The district court denied their motion to intervene.

The Seventh Circuit summarized the applicable principles of substantive federal labor law as follows:

> Thus under the system of collective bargaining mandated by the LMRA, the union (in contrast to the individual employees) is in control of the collective bargaining process and may, in the exercise of good faith and sound discretion, take employee grievances to various steps of the grievance procedure, including the ultimate step of arbitration, so long as it does not violate its statutory duty of fair representation. Vaca v. Sipes, [386 U.S. 171 (1967)]. The grievance procedure as such reaches its culmination in the arbitration award. But in addition, individual employees may not intervene in or maintain suits under the collective bargaining agreement to set aside arbitration awards reached in pursuance of the grievance procedure, particularly in opposition to the union, so long as the union has represented the employees fairly. Acuff and Andrus, both supra. These principles, and the policies underlying them, reflect the philosophy of collective bargaining incorporated in the LMRA and exemplify the fundamental policy of entrusting labor disputes and grievances to the good faith discretion of exclusive bargaining agents.

629 F.2d at 1210 (emphasis original).

The Seventh Circuit permitted intervention in F. W. Woolworth Co. only after

weighing the factors for and against intervention and after examining whether intervention would conflict with any of the labor policies discussed in the cases. The court found four factors in favor of intervention: 1) that the employees were defending, not attacking the arbitration award; 2) that the union defended the award in the district court; 3) that the union did not object to intervention; and 4) that absent intervention, the employees may lose their day in court. The factors against intervention were that: 1) the union would no longer be an active participant; 2) the union might have ceded these claims to Woolworth in exchange for some other concession; and 3) the litigation would be prolonged.

In the present case, the only factor in favor of intervention is the fourth one noted in F. W. Woolworth Co. The remaining

factors all weigh against intervention: the intervenors seek to vacate the arbitration award; the union opposes the award in the district court; and the union has objected to intervention. Additionally, the second factor against intervention in F. W. Woolworth Co. expressly recognizes the union's discretion to reasonably pursue its collective interests at the expense of the interests of a subgroup of its members. That is precisely the choice the defendant Union made in deciding to pursue the grievance of the former Schlitz employees.

Further, all of the policy considerations noted by the Seventh Circuit militate against allowing intervention in this case. See 629 F.2d at 1212. In this case, intervention would increase the cost of the arbitration process and decrease the union's ability to decide what cases to submit to

arbitration. Intervention would decrease the possibility that the arbitrator's decision would be upheld. Further, the union's interest in supervising the administration of the agreement will be injured and the union will incur additional costs in pursuing its position.

Inevitably, when a union decides to accept a grievance filed over the interpretation of a seniority provision in the collective bargaining agreement, it must decide that the provision works in favor of one group of its members and against another group. This does not entitle the members opposed to the Union's position to intervene in the grievance procedure specified by the collective bargaining agreement. Their remedy, absent union action that would constitute unfair representation, is through the internal union procedures.

The proposed intervenor argues that because the union in this case took up the cause of the former Schlitz employees rather than the temporary Miller employees, as a matter of law the union has not provided the temporary Miller employees with fair representation. He relies upon Clark v. Hein-Werner Corp., 8 Wis.2d 264, 272, 99 N.W. 2d 132 (1960), which held that "where the interests of two groups of employees are diametrically opposed to each other and the union espouses the cause of one in the arbitration, it follows as a matter of law that there has been no fair representation of the other group." Clark suggests that the Union's failure to represent the temporary Miller employees in the arbitration entitles those employees to claim unfair representation and therefore come within the exception to F. W. Woolworth Co.'s rule

prohibiting intervention to vacate the arbitration award.

Nevertheless, Clark is not good law. Seven years after Clark, the Supreme Court clarified the standard for finding unfair representation. Vaca v. Sipes, 386 U.S. 171, 190 (1967), held that "[a] breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." The proposed third-party complaint fails to allege any action of the union in connection with the arbitration that was arbitrary, discriminatory, or in bad faith.

The only allegations of the proposed third-party complaint that could possibly support an unfair representation claim by the proposed intervenor are contained in paragraphs 8 and 9, which read as

follows:

> 8. That defendant, Brewery Workers Local Union 9 violated Sections 101 (9)(1) and (2) of the Labor Management Reporting and Disclosure Act of 1959 by failing to submit changes in the seniority provision of the 1981-1983 Collective bargaining agreement to the union members when said defendant incorporated into the 1981-1983 Collective bargaining agreement the addition that Employers signatory to the 1979-81 agreement shall have preference in hiring before any such temporary employee is recalled.
>
> 9. That defendant Brewery Workers Local 9 violated 29 U.S.C. 411 and Article XI of the Constitution and By-Laws of Brewery Workers Local Union No. 9, which grants members a right to adopt and express views on the seniority change, by failing to disclose the proposed seniority change to the unions membership before approval of the contract which incorporated said changes.

These paragraphs vaguely allege that the manner in which the 1981-1983 collective bargaining agreement was adopted violated the rights of the proposed intervenor. However, even if these allegations would

constitute unfair representation, they would not justify the intervention.

The alleged unfair representation is not such as would have tainted the arbitration process. In Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 567 (1976), the Supreme Court held that the union's breach of duty, "if it seriously undermines the integrity of the arbitral process ... also removes the bar of the finality provisions of the contract." Thus, where the union has breached its duty of fair representation, the grievance procedures need not be exhausted before court action is sought by the employees. However, results of the arbitration process which are final under the contract remain final unless the breach taints the arbitral process.

The only issue before the arbitrator was whether the former Schlitz employees

were "laid off" as that term is used in the recall provision of article I, section 5 of the collective bargaining agreement. Once that decision is made, the meaning of the recall provision is clear. The alleged violation of rights in adopting the 1981-1983 contract in no way affect the integrity of the arbitration process. Thus, if the proposed third-party complaint does allege unfair representation by the Union, that allegation does not affect the integrity of the arbitration process and so the proposed intervenor lacks standing to sue to vacate the arbitration award.

Because the motion to intervene must be denied, the motion to certify the proposed intervenor as the representative of a class is moot.

UNION'S MOTION FOR SUMMARY JUDGMENT

The scope of this Court's review of

the arbitration award is very narrow. As the Supreme Court made clear in the Steelworkers Trilogy--United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960)--where the parties have bargained to submit disputes to final and binding arbitration, courts should refuse to review the merits of the award. The arbitration award is legitimate "so long as it draws its essence from the collective bargaining agreement." 363 U.S. at 597.

A. Award Draws Its Essence from the Collective Bargaining Agreement

The plaintiff argues that the arbitrator's award does not draw its essence from

the collective bargaining agreement because "[t]he arbitrator specifically found that the parties did not contemplate a complete plant closing in providing for hiring preference for laid off employees ..., but then proceeded to fill that explicit 'gap' by concluding that the intent of the hiring preference clause was to provide preference to any employee who lost employment through lack of work at another brewery." Memorandum in opposition to defendant's motion for summary judgment 6 [hereinafter cited as Plaintiff's Memorandum]. However, in context, the arbitrator's finding that the parties did not "contemplate" a plant closing does not indicate a finding by him that the agreement was not intended to cover the situation. Rather, the arbitrator's decision at 11 indicates that there was no

indication that the intent of the agreement was to distinguish between layoffs and plant closings. Thus, that the parties did not expressly contemplate plant closings in the agreement does not imply that the arbitrator's award did not draw its essence from the agreement.

That the plaintiff seeks to have this Court review the merits of the arbitrator's decision is clear from the following page of the plaintiff's memorandum, where the plaintiff argues that "the contract draws an explicit distinction between terminations and layoffs." Where the contract draws such a distinction, the meaning of "termination" and "layoff" is a matter of contract interpretation. In fact, the plaintiff admits that the arbitrator's decision draws its essence from the agreement: "[T]he answer to the

question whether employees of Schlitz who lost their jobs as a result of the closing of Schlitz Milwaukee plant were 'laid off' within the meaning of the current labor agreement ... is contained within the four corners of that agreement." Plaintiff's memorandum at 7. Thus, the plaintiff has failed to show that there is any genuine issue over whether the arbitrator's award draws its essence from the collective bargaining agreement.

B. Union's Alleged Breach of its Duty of Fair Representation

The plaintiff next argues that summary judgment is inappropriate because there is a material issue as to whether the union breached its duty of fair representation to certain of the temporary Miller employees. The plaintiff claims that these employees were not informed of the change

made in the preference provision of the 1981-1983 agreement, that they were not informed of the pending grievance by Schlitz employees who lost their jobs when Schlitz closed its plant, that those employees were not given notice of or a chance to participate in the arbitration proceeding, and that the Union refused to provide those employees with copies of the arbitrator's decision. Without examining all of the affidavits submitted to see whether a genuine issue exists on each of these claims, the Court holds that these claims do not provide a basis upon which this Court may vacate the arbitrator's award.

First, the plaintiff does not have standing to complain of any unfair representation by the union. The plaintiff does not claim that the arbitration

procedure followed by the union was contrary to the collective bargaining agreement or that the alleged unfair representation affected the integrity of the arbitration process.

Second, in considering the motion to intervene, this Court has already held that the temporary employees had no right to intervene against the Union. This reasoning equally indicates that they had no right to intervene in the arbitration proceedings. Any claims that the union did not adequately inform or notify the temporary employees would affect the arbitral process only if the temporary employees had a right to intervene in the process.

C. Enforcement of an Unfair Labor Practice.

Next, the plaintiff claims that the preference provision of the agreement may be illegal under § 8 of the Labor

Management Relations Act, 29 U.S.C. § 158, and that this Court should not confirm the arbitration award until the National Labor Relations Board determines the merits of that charge. Miller filed the charge with the NLRB on January 19, 1983, two days after the defendant filed its motion for summary judgment. Resolution of this issue requires that this Court reconcile the primary jurisdiction of the NLRB over unfair labor practices with this Court's jurisdiction over actions brought under § 301 of the Labor Management Relations Act.

In San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959), the Supreme Court held that where activity is arguably subject to § 7 or § 8 of the National Labor Relations Act, the NLRB has primary jurisdiction, exclusive of the state and federal courts. However, where the activity also

violates a collective bargaining agreement, the jurisdiction of the NLRB is not exclusive and does not divest the district court of its jurisdiction over suits under § 301. E.g. Smith v. Evening News Association, 371 U.S. 195 (1962). The Court exempted a § 301 suits from the Garmon principle "because of the evident congressional determination that courts should be free to interpret and enforce collective bargaining agreements even where that process may involve condemning or permitting conduct arguably subject to the protection or prohibition of the National Labor Relations Act." Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America v. Lockridge, 403 U.S. 274, 300 (1971).

While this Court has jurisdiction under § 301 to determine whether certain activity violated the collective bargaining agreement,

even where that activity may be subject to the NLRA, this Court does not have jurisdiction to determine whether certain conduct constitutes an unfair labor practice under § 8 of the NLRA. In Orange Belt District Council of Painters No. 48 v. Maloney Specialties, Inc., 639 F.2d 487, 491 (9th Cir. 1980), the court held that it is no defense to a § 301 enforcement action that enforcement of the arbitration award would compel an unfair labor practice: "'[T]he NLRB's primary jurisdiction precludes federal courts from acting as the initial arbiters of unfair labor practice charges in section 301 actions.'" (quoting Waggoner v. R. McGray, Inc., 607 F.2d 1229, 1231 (9th Cir. 1979)). The court reasoned that if such a defense were allowed there would be nothing left of the NLRB's primary jurisdiction over § 8 cases. 639 F.2d at 491

(quoting Mullins v. Kaiser Steel Corp., 642 F.2d 1302 (D.C. Cir. 1980)).

The holding of Orange Belt is also consistent with the congressional policies underlying the NLRA and § 301. With respect to the primary jurisdiction of the NLRB, the Supreme Court has observed that "Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules." Garner v. Teamsters, Chauffeurs and Helpers Local Union No. 776, 346 U.S. 485, 490 (1953). Were the courts to rule on unfair labor practices, even though only as a defense to § 301 actions, this uniform application of the NLRA would be lost. Nonetheless, the congressional intent under § 301 that courts interpret and enforce collective bargaining agreements requires that the district courts have jurisdiction where the disputed conduct

may not only violate the contract but may also be an unfair labor practice.

Of course, the cost of uniform application of the NLRA is that the district courts may compel action that the NLRB later holds constitutes an unfair labor practice. But the Supreme Court has foreseen such conflicts. Thus, in the language quoted above from Lockridge, the Court acknowledged that the district court may find itself "condemning or permitting conduct arguably subject to the protection or prohibition of the National Labor Relations Act." 403 U.S. at 300. In Carey v. Westinghouse Electric Corp., 375 U.S. 261 (1964), the Court held that arbitration could be compelled even where the NRLB may have jurisdiction over the dispute. The Court admitted that "awards concerning unfair labor practices[] may

later end up in conflict with Board rulings," but noted that "the Board's ruling would, of course, take precedence." 375 U.S. at 272. Although Carey only involved a possible conflict between the Board and an arbitrator, the principle should apply equally to a court enforced arbitration award. This is implicit in Carey's reference to their holding in Smith that the possibility of conflict is no barrier to resort to a tribunal (there the district court) other than the Board. 375 U.S. at 272.

A further implication of the quoted language from Carey, however, is that where the Board has ruled on the matter, courts will defer to its ruling. Thus, a prior ruling by the Board that particular activity constitutes an unfair labor

practice will constitute a good defense to a § 301 action in which enforcement would compel the unfair labor practice. In this case, the court is not acting as the "initial arbiter" of the unfair practice charge but rather is recognizing the precedence of the Board's determination. Indeed, even the scope of the Garmon principle is delimited by clear determinations of the Board: "In the absence of the Board's determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this Court to decide whether such activities are subject to state jurisdiction." Garmon, 359 U.S. at 246. Thus, Garmon does not preclude this Court from recognizing an unfair labor practice where the Board has adjudicated the matter or

where precedent is clear. Each of the cases relied on by the plaintiff for the proposition that this court may look at whether the activity constituted an unfair labor practice were cases in which the Board had previously ruled on the matter.

The alleged unfair labor practice in this case is that the recall preference of article I, section 5, of the collective bargaining agreement, when combined with the contract's union security clause, results in a hiring preference which discriminates in favor of union members. The Court has recently been informed that the NLRB has acted on Miller's charge. On March 4, 1983, the defendant filed with the Court a copy of a letter

from George Squillacote, Regional Director of the NLRB, to George Whyte, counsel for Miller. In that letter, Mr. Squillacote indicated that their investigation failed to show any violation of § 8, and that he was refusing to issue a complaint in the matter. The plaintiff has not indicated whether it will seek review of Mr. Squillacote's determination.

Thus, both on the basis of this Court's lack of jurisdiction to examine whether certain activity constitutes an unfair labor practice and on the basis of the Regional Director's decision not to issue a complaint in this matter, the unfair labor practice defense must fail.

D. Remedy Within Arbitrator's Jurisdiction

The plaintiff complains that the arbitrator exceeded his jurisdiction by

ordering the relief he granted. The arbitrator ordered Miller to hire Gene Pearson and any other employees similarly situated. Miller argues that by ordering Miller to hire these employees, rather than simply ordering Miller to give them preference, the arbitrator's remedy went beyond the clear language of the contract so that the award fails to draw its essence from the contract.

Miller relies on Milwaukee Typographical Union No. 23 v. Newspapers, Inc., 639 F.2d 386 (7th Cir.), cert. denied, 454 U.S. 838 (1981). There, the employer newspaper publisher had installed a video display terminal system in its editorial departments, which introduced electronic preparation, editing and transmission of newspaper copy. The union, representing the composing room employees,

sought to compel the employer to negotiate about the system's impact. The arbitrator decided that while the employer could install the system, the collective bargaining agreement obliged the employer to negotiate with the union over the system's "impact."

The arbitrator's authority over the matter derived from a "new process" clause in the contract which required that when certain new processes were introduced, "all questions concerned with the method of operation, the complement of men required or the retraining of affected employees shall be determined by the Joint Standing Committee." 639 F.2d at 393. The Seventh Circuit held that the arbitrator's order that the employer negotiate over the "impact" of the system did not draw its essence from the contract and

therefore was beyond the arbitrator's jurisdiction.

This case does not come within the admonitions of Newspapers, Inc. for two reasons. First, the arbitrator's award in this case is remedial, not prospective as in Newspapers, Inc. The arbitrator is not ordering Miller to do something more than what is required by clear terms of the contract, but rather is ordering Miller to put the affected employees in the same position they would have been in had Miller properly followed the terms of the contract. This is no different than where an arbitrator orders the employer to rehire an improperly discharged employee. Once the arbitrator finds a violation of the contract, it is within his jurisdiction to create an appropriate remedy.

Second, read as a whole, the arbitrator's award does not order Miller to do anything more than they were required to do under the contract. The arbitrator's award for the violation provided:

> The Company is hereby ordered to hire Gene Pearson effective January 4, 1982 and any other employes similarly situated who had applications on file at the Company and who were not given hiring preference over temporary Miller employees, and make him (them) whole with back pay and contractual benefits, less any earnings which would not have been earned had hiring preference been given.

Arbitration award at 15-16 (emphasis added). The effect of the order is to put those employees who were wrongly denied preference in the same position as they would have been but for the wrongful denial of preference. The effect of the order does not go beyond that. Therefore, the arbitrator did

not exceed his jurisdiction.

E. Public Policy

Miller's last argument is that the award violates clear public policy and therefore should not be enforced. In Local No. P-1236, Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO v. Jones Dairy Farm, 680 F.2d 1142 (7th Cir. 1982), the court held that the clear public policy to prevent adulterated meat through maintenance of sanitary standards precluded enforcement of an arbitration award upholding an employer's rule prohibiting employees from contacting United States Department of Agriculture inspectors in any circumstances. The court stated that "when a court bars enforcement of an arbitration award on the basis of public policy, that public policy must be clearly

defined." 680 F.2d at 1145. In this action, the plaintiff has failed to demonstrate any clearly defined public policy that would be violated through enforcement of the arbitrator's award. The plaintiff's memorandum at 17 refers to the "clear public policy recognizing the rights of employees in a given bargaining unit over the rights of strangers to that bargaining unit" and at 19 refers again to the allegations of unfair representation. Certainly any public policy argument based on labor policy cannot stand up to the clear public policy in favor of resolving disputes through arbitration. This Court finds no clearly defined public policy that would be violated through enforcement of the arbitration award in this case.

Because this Court finds that the arbitrator's award draws its essence

from the contract and that there is no meritorious defense to enforcement of the award, the defendant's motion for summary judgment must be granted.

ATTORNEY FEES

The Union has also moved this Court to award attorney fees against the plaintiff. Such an award against a party who fails to abide by an arbitrator's award is appropriate where that party's position is "wholly devoid of merit." Amoco Oil Co. v. Oil, Chemical and Atomic Workers International Union, Local 7-1, Inc., 548 F.2d 1288, 1296 (7th Cir), cert. denied, 431 U.S. 905 (1977).

In this action, the employer's arguments are all wholly devoid of merit. The only argument that gives this Court pause in awarding attorney's fees is the

asserted unfair labor practice defense. Nonetheless, while it was necessary to carefully examine whether this court had any jurisdiction to consider the defense, precedent clearly indicates that courts may not in the first instance consider a claim of unfair labor practice. Thus, even this asserted defense was wholly without merit.

THEREFORE, IT IS ORDERED that:

1. The motion of Gary Lee Blawat to intervene in this action is denied and his motion for class certification is deemed moot.

2. The defendant's motion for summary judgment is granted. Judgment shall be entered dismissing the complaint, directing the plaintiff to specifically perform the labor arbitration award of Edward B. Krinsky issued on July 26, 1982

in the Matter of Arbitration between Miller Brewing Co. and Brewery Workers Local Union No. 9, confirming that award, awarding interest from the date of the arbitration award on all sums due and owing, and awarding the defendants costs and reasonable attorney fees.

Dated at Milwaukee, Wisconsin, this _____ day of _____, 1983.

UNITED STATES DISTRICT COURT

By:

John W. Reynolds
Chief Judge

UNITED STATES DISTRICT COURT

FOR THE

EASTERN DISTRICT OF WISCONSIN

CIVIL ACTION FILE NO. 82-C-925

MILLER BREWING COMPANY,

vs. JUDGMENT

BREWERY WORKERS LOCAL UNION
NO. 9, DIRECTLY AFFILIATED
LOCAL UNION AFL-CIO

This action came on for hearing before the Court, Honorable John W. Reynolds, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered, granting the defendants' motion for summary judgment.

It is Ordered and Adjudged that the complaint is hereby dismissed and the arbitration award of Edward B. Krinsky issued on July 26, 1982 in the Matter of Arbitration between Miller Brewing Co.

and Brewery Workers Local Union No. 9 is confirmed; the plaintiff is ordered to specifically perform the terms of that arbitration award, to pay interest from the date of the arbitration award on all sums due and owing, and to pay the defendants costs and reasonable attorney fees.

APPROVED:_____ DATE:_____
John W. Reynolds
Chief Judge

Dated at Milwaukee, Wisconsin, this ___ day of _____, 1983.

SOFRON B. NEDILSKY

CLERK OF COURT

By_____
Deputy Clerk